Supreme Court, U.S.
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No. 02- _____

In The
Supreme Court of the United States

JEAN VALETTE BERTHELOT, individually and as representative of all women, 35 years of age or older, beginning January 1, 1991, who were and are entitled to have Medicare, Medicaid, their Insurance Company, or HMO pay for their mammograms in compliance with the mammography guidelines in the Federal Medicare law, or in one of the more than 40 State-mandated-mammography laws.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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27 pgs

QUESTION PRESENTED

Is it a breach of duty for the Government to publish two sets of mammography guidelines contrary to the mammography guidelines that exist in the Federal Medicare, Louisiana Medicaid, Louisiana Insurance and Louisiana HMO laws?

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Berthelot, individually and as representative of all women similarly situated, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals dismissing plaintiff's complaint is unreported. (per curiam, Davis, Benavides and Stewart, App. A). The District Court Opinion dismissing plaintiff's complaint is unreported. (per Barbier, D.J., App. B).

JURISDICTION

On April 10, 2002, the court of Appeals denied the suggestion for rehearing en banc. (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1395m(c)(2)(A) Frequency covered - In General

Subject to revision by the Secretary under subparagraph (B) -

> (i) No payment may be made under this part for screening mammography performed on a woman under 35 years of age.
>
> (ii) Payment may be made under this part for only 1 screening mammography performed on a woman over 34 years of age, but under 40 years of age.
>
> (iii) In the case of a woman over 39 years of age, payment may not be made under this part for screening mammography performed within 11 months following the month in which a previous screening mammography was performed.

42 U.S.C. § 1395b-3 Health insurance advisory service for medicare beneficiaries

> (a) In general The Secretary of Health and Human Services shall establish a health insurance advisory program (in this section referred to as the "beneficiary assistance program") to assist medicare-eligible individuals with the receipt of services under the medicare and medicaid programs and other health insurance programs....
>
> (e) Notice to beneficiaries
> The Secretary shall take such steps as are necessary to assure that medicare-eligible beneficiaries and the general public are made aware of the beneficiary assistance program.

STATEMENT OF THE CASE

The Government began publishing 3 different mammography guidelines on January 1, 1991, when the Medicare mammography law: 42 U.S.C. § 1395m(c)(2)(A), became effective. The National Cancer Institute ("Cancer Institute") and the United States Preventive Services Task Force ("Task Force") are both publishing mammography guidelines contrary to the Federal Medicare law and the laws of more than 40 states, that have caused the delay in the diagnosis of breast cancer for tens of thousands of women. Thus, the Government has caused the premature death of tens of thousands of women.

Berthelot was 35 years old in February 1993. She requested a mammogram, but her doctor told her that because she was not 40, she did not need a mammogram. He refused to order the mammogram for her. Her HMO was mandated by state laws La. R.S. 22:215.11 and La. R.S. 22:2002(6), to pay for the mammogram. Five months later,

Berthelot felt a lump in her breast and returned to the doctor. She had a mammogram and was diagnosed with stage IIIA breast cancer. She had both breasts and seven lymph nodes removed and was treated with radiation and chemotherapy.

Berthelot filed suit in state court for the delay in the diagnosis of her breast cancer against her doctor, her doctor's medical malpractice insurance company, and her HMO alleging medical malpractice and breach of contract. These defendants are using the Cancer Institute and Task Force's current mammography guidelines as a defense by improperly citing them as the medical standard of care for ordering mammograms in Louisiana. However, the Louisiana state law guidelines are the same as the Medicare Law's guidelines, mandating payment for a baseline mammogram between the ages of 35 and 40. Berthelot's case is set for trial in state court on November 18, 2002.

On March 16, 2001, Berthelot filed a RICO complaint against the Government. The District Court held that Berthelot's civil RICO claims were untimely and dismissed her complaint.

After the dismissal of her RICO complaint, Berthelot filed this APA complaint and argued that the conduct causing the harm (the continued publication of mammography guidelines contrary to the Medicare Law) is a continuing tort. The District Court Judge dismissed the case as *res judicata*. The Fifth Circuit held that the two federal lawsuits clearly arise out of a common nucleus of facts, and upheld the dismissal.

The dismissal of Berthelot's APA complaint as *res judicata*, means Federal Court had jurisdiction to hear her earlier RICO complaint. The Fifth Circuit opinion sets the new precedent that the Government has waived sovereign

immunity for RICO claims.

1. Background.

MAMMOGRAPHY SCREENING TO DETECT BREAST CANCER

The Task Force's "Guide to Clinical Preventive Services" was first published in 1989 and recommended mammography for women every 1 - 2 years beginning at 50 years of age.

The Federal Medicare law: 42 U.S.C. § 1395m(c)(2)(A), became effective January 1, 1991 and mandated that Medicare pay for one mammogram for women between the ages of 35 and 39, every 2 years beginning at age 40 and annually beginning at age 50.

The Louisiana mammography laws: La. R.S. 22:215.11, La. R.S. 22:2002, and La. R.S. 46:975, mandate that insurance companies, HMOs and Medicaid pay for mammography screening with the same guidelines as the Federal Medicare law. The laws took effect on January 1, 1992. Since 1991 many states have passed mandated mammography laws like Louisiana's, patterned after the Federal Medicare Law.

From 1989 to December 1993, the Cancer Institute recommended that women between the ages of 40 and 49 undergo mammography screening once every two years, and annual mammography beginning at 50 years of age.

In December 1993, the Cancer Institute misled the public regarding a woman's right to have Medicare, Medicaid, her insurance company, or her HMO pay for mammography screening, when it stopped recommending

mammograms for women between the ages of 40 and 49. The Cancer Institute also recommended that women over age 50 have mammograms every 1-2 years, not annually.

The Cancer Institute knew before it changed its guidelines, that if breast cancer was detected at its earliest stages, deaths from the disease could be reduced by at least 30%, saving the lives of more than 10,000 women every year. The Cancer Institute also knew that 40 states had laws mandating Medicaid, insurance companies and HMOs to pay for mammography screening.

On October 20, 1994, The United States House of Representatives Committee on Government Operations ("The Committee") issued a report entitled: "Misused Science: The National Cancer Institute's Elimination of Mammography Guidelines For Women in Their Forties."

The Committee found that after spending millions of dollars to educate women about the importance of mammography screening in the fight against breast cancer, and after reaching a national consensus on mammography screening, the Cancer Institute stood virtually alone in changing its mammography guidelines.

The Committee said that the Cancer Institute should change its policy of relying solely on random clinical trials ("clinical trials") to determine screening guidelines, as reliance on clinical trials has resulted in the exclusion of other important scientific data and are not practical to study all diseases and cancers.

After the Committee had made its report, the Cancer Institute continued to publish documents targeting African American women with mammography guidelines contrary to the Medicare law, even though the Cancer Institute knew that African American women have a higher breast cancer

mortality rate than white women do, because of their lack of access to mammography screening. (*See* exhibits 1-133 and 1-878 filed in the record).

On January 23, 1997, approximately three years after the Cancer Institute misled the public regarding the value of mammography screening, the Government did it again. The National Institutes of Health ("NIH") issued a draft report once again calling into question the value of early detection of breast cancer by mammography, based upon the same clinical trial evidence, that the Cancer Institute was told not to rely on by the Committee.

On February 5, 1997, The United States Senate subcommittee on Health and Human Services held a hearing to investigate the publication of the draft report issued by the NIH. United States Senator Arlen Specter chaired the hearing and quoted Dr. Daniel Kopans, of Harvard Medical School, who called the NIH report: "**FRAUDULENT**."

Senator Arlen Specter said at the hearing:

> "We all know that if this test comes out and is accepted as not being indicated for women in their 40's, the insurance companies won't pay for it and managed care won't pay for it and then people won't have them available, I think this is an area which needs to be corrected."

On March 26, 1997, after the U.S. Senate had voted 98 - 0 to show concern with the publication of Cancer Institute's screening guidelines, the Cancer Institute changed its mammography guidelines to recommend mammography screening for women every 1 - 2 years beginning at 40 years of age.

On August 5, 1997, the Medicare-mandated-

mammography law: 42 U.S.C. § 1395m(C)(2)(A), was amended to pay for increased mammography screening. Medicare now pays for one mammogram for women between ages 35 and 39 and annual mammograms starting at 40 years of age.

On May 9, 2001, after years of questioning screening, the Cancer Institute finally admitted the value of mammography, in a U.S. Senate Subcommittee Hearing, again chaired by United States Senator Arlen Specter. Dr. Klausner, Director of the Cancer Institute, testified that before 1991 mortality rates from breast cancer were rising, but beginning in 1991 mortality rates began to decline. In 1991 there was a 1.6% decrease in mortality that continued each year until 1995. In 1995, the mortality rate from breast cancer began to decline by 3.5% per year. The Cancer Institute expects to have 30-40% reduction in the mortality rates of breast cancer in the next 10 years. Dr. Klausner testified that the decline in the mortality rates was due to the early detection of breast cancer by mammography.

On February 22, 2002, the Task Force's mammography guidelines were amended to recommend mammograms for women every 1 - 2 years beginning at 40 years of age.

On February 28, 2002, because of the recent publication of articles in medical journals (again questioning the value of mammography) the U.S. Senate Subcommittee held another hearing entitled: "When and How Often Should Women Receive Mammograms." Dr. Andrew Von Eschenbach, the current director of the Cancer Institute, testified that the fundamental contribution of mammography is in the early detection of breast cancer. Dr. Eschenbach reaffirmed Dr. Klausner's earlier testimony that the clinical trials show a decrease in the breast cancer death rates, because of mammography screening.

On April 17, 1997, Dr. Suzanne W. Fletcher, who was criticized by the Committee for receiving over $1 million dollars in grants and contracts from the Cancer Institute in 1993, published an article in the New England Journal of Medicine: "*Whither Scientific Deliberation in Health Policy Recommendation? Alice in the Wonderland of Breast-Cancer Screening.*" Dr. Fletcher stated in the article: "Congress should stay out of this process. In the long run, the health of Americans will not benefit if this technical task moves from the scientific community to the Congress."

REASONS FOR GRANTING THE WRIT

1. Berthelot and American women will continue to suffer serious injuries as a result of the lower courts' decisions, because the dismissal of Berthelot's APA case means that the Government will continue to publish mammography guidelines contrary to the Federal Medicare law, and the laws of more than 40 states, which prevents women from getting the mammograms they are entitled to.

2. The Fifth Circuit's decision waives sovereign immunity for RICO claims against the Government.

1a. BREACH OF DUTY

The Secretary of Health and Human Services has a mandatory duty set forth in: 42 U.S.C. 1395b-3(e), to take such steps as are necessary to assure that medicare-eligible beneficiaries **and the general public** are made aware of the beneficiary assistant program. (emphasis added). The beneficiary assistant program is defined in 42 U.S.C. § 1395b-3(a) to be a health insurance advisory service program to assist medicare-eligible individuals with the receipt of services under the medicare and medicaid programs and other

health insurance programs. Berthelot, the members of her class action, and the jury who will decide her state court case, are all members of the general public.

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency to perform a duty owed to the plaintiff." 28 U.S.C. § 1361.

Berthelot submits that the Government has a mandatory duty to notify her and the public of the Medicare law's mammography guidelines. Furthermore, the Government's publication of two other mammography guidelines, which are contrary to the Medicare law, constitutes gross negligence and a breach of that mandatory duty.

Berthelot has established that the Government owes her a legal duty that is a specific, ministerial act, devoid of the exercise of judgment or discretion. *Richardson v. United States* 465 F.2d 844, 849 (3rd Cir. 1972, *rev'd on other grounds,* 418 U.S. 166, 94 S.CT. 2940, 41 L.Ed. 2d 678 (1974). Berthelot has shown that the legal duty owed to her is set out by statute, and its performance is positively commanded and so plainly prescribed as to be free from doubt. *Giddings v. Chandler*, 979 F.2d 1104, 1108 (5th Cir. 1992).

The Governments' breach of duty has caused and is continuing to cause harm, not just to Berthelot, but to the general public. The Government continues to mislead the public regarding mammography guidelines, doctors' duty to order mammograms, and Medicare's, Medicaid's, Insurance Companies and HMOs' duty, to pay for mammograms.

1b. CONTINUING TORT

The Fifth Circuit held in *Boudreax v. Jefferson Island Storage & Hub,* that a continuing tort is caused by unlawful acts, not the continuation of the ill effects of an original, wrongful act. In Louisiana, when damaging conduct continues, prescription runs from the date of the last harmful act. 255 F.3d 271, 274 (5th Cir. 2001)(citing *Crump v. Sabine River Authority,* 737 So.2d 720, 728 (La. 1999)).

The Louisiana Supreme Court, in *Crump*, held that a continuing tort is caused by ongoing unlawful acts. "For there to be a continuing tort there must be a continuing duty owed to the plaintiff and a continuing breach of that duty by the defendant." *Id* at 728, (citing 54 C.J.S. *Limitations of Actions* § 177 (1987)).

The Louisiana Supreme Court in *S. Cent. Bell v. Texaco Inc.*, held that when the tortious conduct and resulting damages continue, prescription does not begin until the conduct causing the damage stops. 418 So.2d 531, 533 (La. 1982).

Berthelot continues to be damaged by the Governments' guidelines, because the defendants in her state court lawsuit are citing them against her, as the standard of care for ordering mammograms in Louisiana. She has the burden to prove that the Cancer Institute and Task Force's guidelines are not the standard of care for doctors to order mammograms in Louisiana.

2a. WAIVER OF THE GOVERNMENT'S SOVEREIGN IMMUNITY FOR RICO CLAIMS.

The Fifth Circuit held that Berthelot's two federal lawsuits "clearly arise out of a common nucleus of facts and

her current APA action is barred by *res judicata.*" (5th Cir. opinion, App. 3).

The Fifth Circuit's opinion conflicts with this United States Supreme Court's decision in *Fed. Deposit Ins. Corp. v. Meyer,* 510 U.S. 471, 475, 114 S.Ct. 996, 1000, 127 L.Ed.2d. 308, (1994), the Fifth Circuit's reasoning in *Ellis v. Amex Life Ins. Co.,* 211 F.3d 935, 937 (5th Cir. 2000), and the recent opinion by Judge Garaufis in the Eastern District of New York. *European Community v. RJR Nabisco, Inc.* 150 F.Supp.2d 456, 490 (E.D.N.Y. 2001).

The Fifth Circuit's opinion is implicitly and necessarily based upon a finding that the dismissal of Berthelot's earlier RICO complaint was rendered by a court of competent jurisdiction and a final judgment on the merits. The Fifth Circuit's opinion creates an arbitrary exception to the holding of this United States Supreme Court that without a waiver, sovereign immunity shields the Government and its agencies from suit. *Fed. Deposit Ins. Corp. v. Meyer,* 510 U.S. 471, 475, 114 S.Ct. 996, 1000, 127 L.Ed.2d. 308 (1994).

Sovereign immunity is jurisdictional in nature. The Government's consent to be sued in any court defines that court's jurisdiction to hear the suit. The Government can not be sued without its consent and the existence of consent is a prerequisite for jurisdiction. *Id.*

New York District Court Judge Garaufis recently reaffirmed this precedent when he held that the Government is immune from suit under sovereign immunity principles and it cannot be a defendant under RICO. *European Community v. RJR Nabisco, Inc.* 150 F.Supp.2d 456, 490 (E.D.N.Y. 2001)(citing: *U.S. v. Bonanno Org. Crime Fam. Of La Cosa Nostra,* 879 F.2d 20, 23 (2nd Cir. 1989)).

2b. ARGUMENT - *RES JUDICATA*

The Fifth Circuit held that federal res judicata rules determine the preclusive effect of an earlier federal court judgment. "Res judicata is appropriate if: 1) the parties to both actions are identical (or at least in privity); 2) the judgment in the first action is rendered by a court of competent jurisdiction; 3) the first action concluded with final judgment on the merits; and 4) the same claim or cause of action is involved in both suits." *Ellis v. Amex Life Ins. Co.*, 211 F.3d 935, 937, (5th Cir. 2000)

In *B. Inc. v. Miller Brewing Co.*, the Fifth Circuit stated that when deciding the threshold question of jurisdiction to hear a case, one must consider certain fundamentals of jurisdiction. The jurisdiction of the federal courts is limited, with its scope defined by the Constitution and by statute. When a court rules on a case that is not within the the realm of controversies assigned to it by the Constitution and statute, the federal court intrudes upon the territory of a coordinate judicial system, and the decisions, opinions and orders of the court have no effect. "Thus, the court must be certain of its jurisdiction before embarking upon a safari in search of a judgment on the merits." 663 F.2d 545, 548, (5th Cir. 1981).

The Fifth Circuit in *Nilsen v. City of Moss Point, Miss.*, stated that res judicata will bar an action if there has been a earlier judgment on the merits on the same cause of action in a suit between the same parties. "A dismissal for lack of subject matter jurisdiction is <u>not</u> a bar to a later action brought in a court of competent jurisdiction on the same claim." 674 F.3d 379, 382 (5th Cir. 1982), *see* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1350 (1969).

Again, in *Nilsen v. City of Moss Point, Miss.*, the Fifth Circuit held that cases dismissed because of no

jurisdiction are not decisions on the merits, while those based on limitations are. Cases dismissed for lack of jurisdiction are paradigms of non-merits adjudication. They say nothing about the merits of the case. So the dismissal of the case, whatever its merits, only means that it is not the kind of case the court has the authority to consider. 701 F.2d 556, 562 (1983).

In light of this jurisprudence, the court did not have federal subject matter jurisdiction to hear Berthelot's RICO complaint. Therefore, its dismissal was not by a court of competent jurisdiction and was not a judgment on the merits; thus, Berthelot's APA lawsuit should not be dismissed as *res judicata*.

CONCLUSION

THEREFORE, Petitioner Jean Berthelot, individually and as class representative requests this Court to GRANT a writ of certiorari to the Fifth Circuit Court of Appeals.

Berthelot further submits that she, and the members of her class action, are entitled to an immediate preliminary injunction ordering the Government to stop publishing mammography guidelines contrary to the Federal Medicare law.

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